[Cite as *State v. Scholl*, 2012-Ohio-6233.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellant,	:	No. 12AP-309 (C.P.C. No. 11CR-3785)
v.	:	(REGULAR CALENDAR)
Britton Scholl,	:	
Defendant-Appellee.	:	

D E C I S I O N

Rendered on December 31, 2012

Ron O'Brien, Prosecuting Attorney, and *Seth L. Gilbert*, for appellant.

Tyack, Blackmore & Liston Co., L.P.A., and *Thomas M. Tyack*, for appellee.

APPEAL from the Franklin County Court of Common Pleas

BRYANT, J.

{¶ 1} Plaintiff-appellant, State of Ohio, appeals from a judgment of the Franklin County Court of Common Pleas granting the motion to suppress of defendant-appellee, Britton Scholl. The state assigns a single error:

> The Trial Court Erred In Suppressing Defendant's Written Confession That He Set His Own Truck On Fire.

Because the trial court erred in concluding defendant's confession was involuntary, we reverse.

I. Facts and Procedural History

{¶ 2} By indictment filed July 18, 2011, defendant was charged with one count of arson in violation of R.C. 2909.03(A)(2). According to the indictment, defendant "by

means of fire or explosion did knowingly cause or create a substantial risk of physical harm to any property of Britton Scholl or another, to wit: a motor vehicle, with purpose to defraud."

{¶ 3} Defendant responded to the indictment with a motion to suppress his statement that admitted he burned his own motor vehicle, contending the statement was involuntary. The parties supplied the trial court with the pertinent documents and a videotape of the fire investigator's interrogation of defendant, dispensing with a hearing on the motion.

{¶ 4} Based on the evidence submitted, the trial court granted defendant's motion, citing various parts of the interrogation that not only "stressed repeatedly it would be an easier resolution if Defendant would admit that he burned his own truck," but also "continued to urge Defendant to confess because that would be no crime[,] or at least a lesser crime thus simplifying things for Defendant." (Decision and Entry, at 2.) The court concluded by noting, "Defendant did not say he burned his truck because he did; rather because he was convinced that by saying he did [he] would avoid jail time, get a plea offer of a misdemeanor, and a sentence as lenient as thirty (30) days community service." (Decision and Entry, at 2.) The state appeals.

II. Assignment of Error

{¶ 5} The state's single assignment of error contends the trial court erred in granting defendant's motion to suppress, as the evidence does not demonstrate defendant's statement was involuntary.

A. *Applicable Law*

{¶ 6} The Fifth Amendment to the United States Constitution provides that an individual shall not "be compelled in any criminal case to be a witness against himself." The United States Supreme Court applied the protection of the Fifth Amendment right against self-incrimination to police interrogations of individuals in custody. *See Miranda v. Arizona,* 384 U.S. 436, 444 (1966). Defendant signed a written waiver of his *Miranda* rights, and *Miranda* is not implicated here. *See State v. Walker,* 10th Dist. No. 04AP-1107, 2005-Ohio-3540, ¶ 23.

{¶ 7} The voluntariness of a confession presents "an issue analytically separate from those issues surrounding custodial interrogations and *Miranda* warnings." *Walker*

at ¶ 24, citing *State v. Kelly*, 2d Dist. No. 2004-CA-20, 2005-Ohio-305. "Using an involuntary statement against a defendant in a criminal trial is a denial of due process of law." *State v. Carse*, 10th Dist. No. 09AP-932, 2010-Ohio-4513, ¶ 23, citing *Mincey v. Arizona*, 437 U.S. 385, 398 (1978). " 'The voluntariness of a defendant's statement is determined from the totality of the circumstances.' " *Carse* at ¶ 23, quoting *State v. Douglas*, 10th Dist. No. 09AP-111, 2009-Ohio-6659, ¶ 26, citing *State v. Frazier*, 115 Ohio St.3d 139, 2007-Ohio-5048, ¶ 112. The court should consider the age, mentality, and prior criminal experience of the accused, the length, intensity, and frequency of interrogation, the existence of physical deprivation or mistreatment, and the existence of threats or inducements in determining the voluntariness of a defendant's statements. *Carse* at ¶ 23, quoting *Frazier* at ¶ 112, quoting *State v. Mason*, 82 Ohio St.3d 144, 154 (1998), quoting *State v. Edwards*, 49 Ohio St.2d 31 (1976), paragraph two of the syllabus, overruled on other grounds. *State v. Jackson*, 50 Ohio St.2d 253, 257-58 (1977).

{¶ 8} "[C]oercive police activity is a necessary predicate to the finding that a confession is not 'voluntary' within the meaning of the Due Process Clause of the Fourteenth Amendment." *Colorado v. Connelly*, 479 U.S. 157, 167 (1986). "Absent police conduct causally related to the confession, there is simply no basis for concluding that any state actor has deprived a criminal defendant of due process of law." (Footnote deleted.) *Id.* at 164. "Evidence of use by the interrogators of an inherently coercive tactic (*e.g.*, physical abuse, threats, deprivation of food, medical treatment, or sleep) will trigger the totality of the circumstances analysis." *State v. Clark*, 38 Ohio St.3d 252, 261 (1988).

B. *The Interrogation*

{¶ 9} Neither party disputes the underlying facts, but only their ramifications in assessing whether law enforcement coerced a confession from defendant. A fire investigator interrogated defendant for approximately two hours and began with defendant's waiving his *Miranda* rights and defendant's explaining that he left his truck at a friend's house to ride to work with his friend. When he and his friend returned to the friend's house, the truck was gone. According to defendant, he bought the truck as a

birthday present to himself for $14,000, it developed a transmission leak, and it was insured through Grange Insurance.

{¶ 10} When the fire investigator combined those facts with having found the burning truck about the same time defendant discovered it was missing, the fire investigator suspected defendant had someone set fire to the truck so he could collect the insurance proceeds and rid himself of a less than desirable asset. Relatively early in the interrogation, the investigator told defendant he could take a voice stress test to clear himself. Defendant agreed, and law enforcement informed him shortly after he took it that he failed the test.

{¶ 11} Apart from the voice stress test, the interrogation had themes that repeated during the course of the two hours:

- The fire investigator advised defendant of his theory that the truck was a burden, so defendant disposed of it to collect the insurance proceeds.
- The fire investigator informed defendant no law prohibited him from burning his own truck, but if he made an insurance claim for the truck and received money, then he broke the law.
- The fire investigator assured defendant that if defendant would talk with him, he could help defendant work out the situation; if defendant did not, the situation would become much worse, and defendant's lack of cooperation would be passed on to the judge and prosecutor.
- The fire investigator told defendant he should tell the truth.
- Defendant advised he did not burn the vehicle or ask anyone else to do so, but inquired whether he should say he did to receive a potentially lighter sentence. The investigator advised defendant to tell the truth but stated defendant's so admitting would probably result in a misdemeanor charge.
- The fire investigator discussed the possibility of defendant being a complicitor due to his having expressed to a number of people his wish that someone would burn the truck. Another investigator later explained that, in the absence of an exchange of money, complicity was not an issue.

{¶ 12} About 1 hour and 15 minutes after the interview began, defendant, in his 20s, asked if his father could be present; his request was granted. Defendant admitted he was considering two options: to continue to deny his involvement and risk going to jail or to admit his culpability, not file an insurance claim and eliminate the chances of going to jail. When his father said the claim was filed, defendant inquired whether he could avoid jail by admitting his guilt and withdrawing the claim. A fire investigator advised that if defendant did not admit his involvement, he likely would be charged with arson and receive either probation or jail time.

C. *The Record Does Not Demonstrate Coercion*

{¶ 13} Defendant did not suggest in the trial court that the investigator used physical abuse, threats, or deprivation of food, medical treatment or sleep to coerce defendant into admitting his involvement in the indicted offense. Rather, defendant argued in the trial court that the investigator misrepresented to defendant the nature of the offense, the voice stress test, and the results of his cooperation with investigators, all of which were sufficiently deceitful to overcome his will and result in an involuntary statement.

{¶ 14} In *State v. Hughbanks*, 99 Ohio St.3d 365, 2003-Ohio-4121, ¶ 62, the Supreme Court of Ohio "rejected the premise that voluntariness of a confession depended on notions of 'free will.' " Rather, " 'voluntariness * * * has always depended on the absence of police overreaching, not on "free choice" in any broader sense of the word.' " *Id*., quoting *Connelly* at 170. The question then is whether the fire investigator was overreaching during an interrogation, and the dispositive issue is whether the statements the investigator made to defendant were so misrepresentative or deceitful as to coerce defendant into declaring he burned his own truck.

{¶ 15} Admissions to tell the truth are not coercive; the use of deceitful tactics is not dispositive but only a factor; and suggestions of leniency, promises that cooperation will be considered, and statements that confessions will be helpful do not invalidate an otherwise legal confession. *State v. Carovillano*, 1st Dist. No. C-060658, 2007-Ohio-5459, ¶ 25; *State v. Reeves*, 2d Dist. No. 2002-CA-9, 2002-Ohio-4810, ¶ 8, 13 (noting "a police officer's misrepresentation about the evidence against a defendant does not per se render a confession involuntary"), and cases cited *State v. Wiles*, 59 Ohio St.3d 71, 81

(1991) (observing "police deception, standing alone, does not render a confession involuntary") *Reeves* at ¶ 14; *State v. Stringham*, 2d Dist. No. 2002-CA-9, 2003-Ohio-1100, ¶ 16 (pointing out "admonitions to tell the truth are considered neither threats nor promises and are permissible," and "assurances that a defendant's cooperation will be considered or that a confession will be helpful do not invalidate a confession") and case cited *State v. Bailey*, 2d Dist. No. 94 CA 39 (Mar. 31, 1995) (concluding "a statement that the defendant 'could help himself' by speaking with investigators [was] not impermissibly coercive because 'the advice was non-specific as to how making a statement would be advantageous' ") *Stringham* at ¶ 16.

{¶ 16} Without question, the investigator here repeatedly told defendant to tell the truth, but such statements are not coercive. *Carovillano*. Nor can we say the investigator's statements that defendant's burning his own property was not a crime, unless he did so to defraud an insurance company, were so deceitful as to be coercive; the investigator admitted the latter to be a crime. *Reeves*. Although the investigator also discussed the notion of complicity, mentioned in the trial court's decision, those comments appear directed to the investigator's belief that defendant somehow urged someone else to burn his truck. Although the investigator's view of complicity may have been less than accurate, the issue was clarified when another investigator explained the matter more fully to defendant.

{¶ 17} Nor did the investigator ever promise defendant that no charge would be filed or that defendant would not suffer jail time if he confessed to the crime. The investigator extended the possibility that the crime could be either felony or misdemeanor, and the concurrent possibility that probation or community control could accrue, but neither scenario is out of the question depending on the level of charge filed against defendant. Cf. *State v. Petitjean*, 140 Ohio App.3d 517 (2d Dist.2000) (involving law enforcement's representation to the defendant that he likely would receive probation if he confessed to murder). In any event, during the course of the interview, the fire investigator advised that the charges could be either felonies or misdemeanors and that he did not control what charges were filed; the prosecutors did.

{¶ 18} Defendant, however, contends the investigator's use of the voice stress test was deceptive and coerced defendant's confession. As the state points out, the trial court did not find that conduct to be coercive; nor did the trial court indicate the investigator either lied about the accuracy of the test or was required to advise defendant of the inadmissibility of such test results. Indeed, the record is sparse with respect to the test. Apart from the investigator's purportedly administering the test, nothing in the record indicates it actually was administered or the accuracy of the reported results. Similarly, nothing in the record indicates the test was not given, and although the investigator never advised defendant the test would be inadmissible, he likewise did not advise it would be admissible.

{¶ 19} Although the voice stress test may be the most disconcerting aspect of the interrogation, the record leaves little basis to find the type of deceit or misrepresentation necessary to support a finding of coercion. *State v. Bays*, 87 Ohio St.3d 15, 23 (1999). Given the facts, we are constrained to conclude the trial court erred in finding the interrogation to be coercive. We are aware that the trial court believes defendant did not commit the offense, as indicated in its decision and entry. We are further aware that, on remand, the trial court well may be the fact finder in this case. We nonetheless are required to apply the law, with the result here that the investigator did not coerce defendant into a confession.

{¶ 20} The state's single assignment of error is sustained.

III. Disposition

{¶ 21} Having sustained the state's single assignment of error, we reverse the judgment of the Franklin County Court of Common Pleas and remand for further proceedings consistent with this decision.

Judgment reversed
and case remanded.

KLATT and FRENCH, JJ., concur.